

Fall 1978

# Judicial Consideration of the Delegation of Legislative Power to Regulatory Agencies in the Progressive Era

John H. Garvey  
*University of Kentucky*

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Administrative Law Commons](#), and the [Legislation Commons](#)

## Recommended Citation

Garvey, John H. (1978) "Judicial Consideration of the Delegation of Legislative Power to Regulatory Agencies in the Progressive Era," *Indiana Law Journal*: Vol. 54 : Iss. 1 , Article 3.

Available at: <http://www.repository.law.indiana.edu/ilj/vol54/iss1/3>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# Judicial Consideration of the Delegation of Legislative Power to Regulatory Agencies in the Progressive Era

JOHN H. GARVEY\*

## JUDICIAL CONSIDERATION OF THE DELEGATION OF LEGISLATIVE POWER

Despite the vigorous debate which it occasioned in other circles,<sup>1</sup> the practice of delegating legislative power to regulatory agencies which began at the end of the nineteenth century was never seriously questioned by American courts during the progressive era. This is not to say that the judiciary saw no threat posed by government by institutions of a form undreamed of at the time the Constitution was framed. Since the appearance of the first regulatory commissions, the courts have shown a concern to protect individual rights which recently may be seen in the insistence on procedural safeguards in agency adjudication and rule-making which informs the Administrative Procedure Act.<sup>2</sup> But the judicial branch at the turn of the century was little troubled by the absence of democratic input into the regulatory commission's rule-making process, for the courts saw the same threat-subjection of individual rights to uncontrolled majority interests-posed by regulatory commission and legislature alike. Judicial response consequently took form not in a remand of non-delegable powers to the legislature, but in the doctrines of the non-finality of administrative and legislative action, and in efforts to narrow and define the constitutionally permissible scope of such action.

### *Early Administrative Agencies*

The regulatory agency of the late nineteenth century presented democratic theory with delegation problems of a different magnitude than those occasioned by earlier administrative agencies. Before the enactment of the Interstate Commerce Act in 1887,<sup>3</sup> the administrative concerns of the federal government were few, and involved little discretion. Aside from the collection of tariffs, they centered about the distribution of national wealth and performance of public services: land sales and grants, internal improvements, development of a merchant fleet and coastal shipping, establishment of a postal system, and granting of

---

\*A.B., 1970, Notre Dame; J.D., 1974, Harvard University. Assistant Professor of Law, University of Kentucky. The substance of this article was originally submitted in partial fulfillment of the requirements for a J.D. degree at Harvard University in 1974.

<sup>1</sup>See, e.g., 40 CONG. REC. 3108-12 (1906) (remarks of Sen. Foraker) (Hepburn Act debates); T.M. COOLEY, CONSTITUTIONAL LIMITATIONS 137-46 (6th ed. 1890); E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 14 (1928); R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 428-33 (1941) (hereinafter cited as CUSHMAN).

<sup>2</sup>5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*, 3105 (1970).

<sup>3</sup>Act of 4 Feb. 1887, ch. 104, 24 Stat. 379 (1887).

patents and copyrights.<sup>4</sup> The states, closer to the frictions of everyday life, began earlier than the federal government to regulate the actions of their citizens. State police powers were exercised by boards charged with enacting and enforcing sanitary codes and inspection laws, laying and collecting assessments, and granting and withdrawing licenses to doctors, pharmacists, and auctioneers.<sup>5</sup> Quite restrained by comparison with the regulatory agencies established by the federal government in the next century, these boards were concerned, for example, "[t]hat no cattle

be driven in the generally builtup portions of either of the cities of New York or Brooklyn, except between the hours of nine of the evening and one hour after sunrise       "<sup>6</sup>

Between the Civil War and the latter part of the century, both federal and state courts with little difficulty found that legislative delegation of such functions was consistent with the basic tenet of a republican form of government: that the people, through elected representatives, should frame the laws governing their relations with the government and with one another. It was felt that questions properly legislative, involving matters about which public opinion should be expressed, were fully determined when the affair was turned over to administrators. If discretion were granted, it was only in the discernment of facts still contingent at the time the legislature acted, the mere determination of which by the agency would invoke a prepared legislative response. For example, Congress might leave to the executive branch the power of imposing a predetermined tariff on several named products, if the exporting countries should impose on American products "reciprocally unequal and unreasonable" duties.<sup>7</sup> Administrative freedom was also allowed in filling the interstices of a law which otherwise spoke to all matters important enough to be of popular concern. There was no delegation of legislative power in leaving to the Supreme Court the administrative task of determining "the forms of writs, executions, and other process, and the forms and modes of proceeding in suits."<sup>8</sup> A variant of this second justification was that the legislature had prescribed a standard suffi-

---

<sup>4</sup>T. LOWI, *THE END OF LIBERALISM* 128 (1969). L.D. WHITE, *THE FEDERALISTS* (1978).

<sup>5</sup>The grants of such powers by state legislatures were almost uniformly upheld as proper delegations. See, e.g., *People v. Brooks*, 101 Mich. 98, 59 N.W. 444 (1894) (fishing permit); *In re Kingman*, 153 Mass. 566, 27 N.E. 778 (1891) (assessments); *Schwab v. Grant*, 126 N.Y. 473, 27 N.E. 964 (1891) (auctioneer's license); *State v. Heinemann*, 80 Wis. 253, 49 N.W. 818 (1891) (pharmaceutical license); *Port Royal Mining Co. v. Hagood*, 30 S.C. 519, 9 S.E. 686 (1889) (mining license); *Hildreth v. Crawford*, 65 Iowa 339, 21 N.W. 667 (1884) (pharmaceutical license); *In re Roberts*, 17 Hun. 559 (N.Y. Sup. Ct. 1879) (assessments); *People v. Harper*, 91 Ill. 357 (1878) (inspection law); *Polinsky v. People*, 73 N.Y. 65 (1878) (sanitary code); *Cooper v. Schultz*, 32 How. Pr. 107 (N.Y.C.P. 1866) (sanitary code).

<sup>6</sup>*Cooper v. Schultz*, 32 How. Pr. 107, 107-08 (N.Y.C.P. 1866).

<sup>7</sup>*Field v. Clark*, 143 U.S. 649, 692 (1892) (McKinley tariff). Cf. *In re Kingman*, 153 Mass. 566, 27 N.E. 778 (1891) (sewage plant assessments); *People v. Dunn*, 80 Cal. 211, 22 Pac. 140 (1889) (selection of building site).

<sup>8</sup>*Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 31 (1825). See also *Hurst v. Warner*, 102 Mich. 238, 60 N.W. 440 (1894) (sanitary regulations). But see L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 87 (1968); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561, 581-92 (1947).

ciently definite to confine administrative action within narrow bounds.<sup>9</sup>

*State and Federal Regulatory Commissions*

With the appearance of the first independent regulatory commissions during the latter half of the last century, one might expect to find a reappraisal of the delegation question in the courts. The new species of agency exercised powers far in excess of those formerly granted and theories which until that time had validated the practice of legislative abdication simultaneously became strikingly inadequate. It might thus seem curious that the judiciary of the progressive era was so little troubled by the delegation issue. The reason is not simply that it was expedient to defer to a bureaucracy made necessary by changed conditions; nor would it be accurate to suppose that ideas about agency expertise or interest-group liberalism affected the courts' response. Those notions belong to a later period.

The regulatory commission appeared on the state level after the Civil War, as a response to problems created by the first instance of powerful economic concentration, the railroads. Vexing difficulties appeared as the railroads carried and supplied settlers of the central and western states. Tracks were laid across areas which never became populous enough to sustain service, and the railroads were able to pass on their costs in the form of high rates to users.<sup>10</sup> One of the objectives of the Granger movement was the establishment of strong commissions with powers to fix maximum rates,<sup>11</sup> and to prosecute violations of regulatory legislation.<sup>12</sup> By 1887 ten states had taken such action.<sup>13</sup> In response to less extreme problems the eastern states established commissions whose powers were mainly advisory to report to the legislature on compliance with charters, inspect roads, investigate accidents, and examine accounts.<sup>14</sup>

The impulse behind enactment of the Interstate Commerce Act arose from several sources. It was widely acknowledged by those concerned to contain the power of the railroads that state regulation was ill-conceived and ineffective.<sup>15</sup> Moreover, the railroads themselves had an interest in nationally uniform and predictable regulation, which might have the additional benefit of neutralizing the fierce competition that made their existence so hazardous.<sup>16</sup> Legislation was well underway<sup>17</sup> when the

<sup>9</sup>See, e.g., *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) *United States v. Grimaud*, 220 U.S. 506, 522 (1911); (legislation gave a "primary standard").

<sup>10</sup>CUSHMAN at 25.

<sup>11</sup>In most cases the rates established by such commissions would be only prima facie reasonable, and were subject to challenge in judicial proceedings. *Id.* at 27. *But see Smyth v. Ames*, 169 U.S. 466 (1898), striking down a Nebraska statute which made a rate set by the legislature or commission conclusive upon the courts.

<sup>12</sup>CUSHMAN, *supra* note 1, at 27.

<sup>13</sup>*Id.* at 26.

<sup>14</sup>*Id.* at 22-23; C.F. ADAMS, *RAILROADS: THEIR ORIGIN AND PROBLEMS* 137 (1878).

<sup>15</sup>See I. TARBELL, *THE NATIONALIZING OF BUSINESS* 97-98 (1936); CUSHMAN, *supra* note 1, at 34; I.L. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 17-19 (1931).

<sup>16</sup>G. KOLKO, *RAILROADS AND REGULATION: 1877-1916*, at 1-44 (1965).

<sup>17</sup>*Id.* at 33.

Supreme Court declared that regulation of interstate railroad transportation was a matter of strictly federal concern, even as to portions of a trip strictly within state lines.<sup>18</sup>

The Interstate Commerce Act as originally enacted in 1887<sup>19</sup> attempted chiefly to prevent excessive charges and discriminatory practices. To control rates, section one declared that all charges should be just and reasonable, and section five forbade agreements to divide up traffic or revenues. To prevent discrimination, sections two and three in general prescribed equal charges for like services, and section four forbade greater aggregate charges for shorter hauls. The Interstate Commerce Commission (ICC) was also given publicity and investigatory powers.<sup>20</sup> Commission orders were enforceable only on its or an interested party's application to the courts, where Commission findings of fact were to be accepted as *prima facie* evidence.<sup>21</sup>

Although the challenge was soon made on the state level that a grant of rate-making power was a legislative abdication, the courts uniformly rejected such claims. The doctrinal justifications were the same as had been advanced to support the much more restrained grants of powers in the earlier cases. An instructive example is *Minnesota ex rel. Railroad & Warehouse Commission v. Chicago, Milwaukee & St. Paul Railway Co.*<sup>22</sup> The statute establishing the Minnesota commission provided it with the power to declare "reasonable and equal" rates, enforceable by an action of mandamus,<sup>23</sup> in which the rates set by the commission were conclusively presumed to be reasonable.<sup>24</sup> The Minnesota Supreme Court upheld the statute under the state constitution. The court found that delegation of a legislative power was permissible in several situations. Discretion could be exercised by an administrative agency in the determination of facts to which would be applied legislatively prescribed standards. An example similar to the fixing of railroad rates was the assessment of property values. Some discretion might also be exercised in filling in the interstices of a statute by the body charged with its execution.<sup>25</sup> Thus the Railroad & Warehouse Commission would have a power to enact rules and regulations defining "ample, equal, and reasonable facilities for trade and travel" akin to the power possessed by courts to prescribe rules of procedure under a general enabling act.<sup>26</sup>

---

<sup>18</sup>*Wabash, St.L. & P.R.R. v. Illinois*, 118 U.S. 557 (1886).

<sup>19</sup>Act of 4 Feb. 1887, ch. 104, 24 Stat. 379.

<sup>20</sup>Act of 4 Feb. 1887, ch. 104, §§ 12, 13, 24 Stat. 383-84.

<sup>21</sup>Act of 4 Feb. 1887, ch. 104, § 16, 24 Stat. 384-85.

<sup>22</sup>38 Minn. 281, 37 N.W. 782 (1888), *rev'd on other grounds*, 134 U.S. 418 (1890).

<sup>23</sup>Act of 7 March 1887, ch. 10 § 8(e)-(g), 1887 Minn. Gen. Laws 49.

<sup>24</sup>38 Minn. at 294-95, 37 N.W. at 784.

<sup>25</sup>*Id.* at 299-300, 37 N.W. at 787.

<sup>26</sup>*Id.* at 291, 300, 37 N.W. at 782-83, 787. *Cf. Cincinnati, W & Z. R.R. v. Comm'rs. of Clinton Cty.*, 1 Ohio St. 77, 88 (1852) ("The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferred authority or discretion as to its execution, to be exercised under and in pursuance of the law.")

Challenges of improper delegation made against state railroad commissions' power to set rates which would be accepted *prima facie* as reasonable were rejected in a number of other states, on

The attitude of the United States Supreme Court was similar. At least until the passage of the Hepburn Act in 1906,<sup>27</sup> the Court seemed unwilling to recognize a grant of substantial power to the Interstate Commerce Commission.<sup>28</sup> But the Court's reluctance to admit that real rule-making power had been granted did not stem from a conviction that it was not within Congress's authority to do so. In 1910 the Interstate Commerce Act was amended to require application to the ICC in all cases in which

---

grounds similar to those cited in *Chicago, Milwaukee & St. Paul*, and in *Cincinnati, Wilmington and Zanesville*. See, e.g., *Board of Transp. v. Fremont, E. & M.V. R.R.*, 22 Neb. 313, 35 N.W. 118 (1887); *Chicago, Burlington & Quincy R.R. Co. v. Jones*, 149 Ill. 361, 35 N.E. 246 (1894); *McWhorter v. Pensacola & Atl. R.R.*, 24 Fla. 417, 5 S. 129 (1888); *Storrs v. Pensacola & Atl. R.R.*, 29 Fla. 617, 11 S. 226 (1892); *Tilley v. Savannah, Fla. & W. R.R.*, 5 F. 641 (C.C.S.D. Ga. 1881).

(Ct. App. 1877) (determination of route for city transit system); *Portland & Oxford Central R.R. v. The Grand Trunk Ry.*, 46 Me. 69 (1858) (determination of contract terms for connecting railroads).

Besides the railroad commission, the most common type of state regulatory agency in the late nineteenth and early twentieth centuries was the insurance commission, whose function was to control the issuance and terms of insurance policies. Between 1895 and 1905 courts in five states declared unconstitutional the delegation to a commission of the power to write a standard policy. *O'Neil v. American Fire Ins. Co.*, 166 Pa. 74, 30 A. 945 (1895); *Anderson v. Manchester Fire Assurance Co.*, 59 Minn. 182, 63 N.W. 241 (1895); *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738 (1896); *Phoenix Ins. Co. v. Perkins*, 19 S.D. 59, 101 N.W. 1110 (1905); *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, 103 N.W. 616 (1905). It is, however, difficult to avoid the inference that these cases rested on no more than a feeling that "Sometimes (to reverse Dean Pound's comment) the commonwealth must suffer for John Doe's sake." D. PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* 253-54 & n.49 (1927). In all of these cases but *King*—where both plaintiff and defendant argued that the legislation was unconstitutional—the invalidation of the delegation resulted in the insured's recovery. Frequently the decision rested on the flimsiest of grounds. Thus, the *Anderson* court found a possibility for unbridled discretion under a statute which provided that the commission should adopt a policy conforming to the one then in force in New York. In the other cases one is left with the suspicion that the court was merely dissatisfied with the terms of the policy adopted by the insurance commission. Thus the court in *O'Neil* said of the standard contract, "It seems to be framed in the interest of dishonest companies and insurance brokers . . . [ , thus] showing the impolicy of such delegation of legislative power as might make it possible to fasten upon the people of the commonwealth a form of contract, open to such grave objections." 166 Pa. at 74, 30 A. at 945. At any rate the pattern of decisions was quickly reversed. See, e.g., *Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928) (overruling *Dowling*); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914); *Martin v. Howard*, 96 Neb. 278, 147 N.W. 689 (1914); PATTERSON, *supra*, at 255-56.

<sup>27</sup>Act of 29 June 1906, ch. 3591, 34 Stat. 584.

<sup>28</sup>See I. L. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 25-35, 38-40 (1931); I. TARBELL, *THE NATIONALIZING OF BUSINESS* 105 (1936); G. KOLKO, *RAILROADS AND REGULATION: 1877-1916*, at 80-86 (1965); H. FAULKNER, *POLITICS, REFORM AND EXPANSION* 78-79 (1959).

In *ICC v. Cincinnati, N.O. & Tex. Pac. Ry.*, 167 U.S. 479 (1897) (the Maximum Rate Case) overturning the ICC's action in setting a schedule of rates for a number of carriers over several routes, the Court showed an extreme reluctance to infer a grant of rate-making power, absent explicit statutory directions. 167 U.S. at 505-06. The decision rested in part on a lack of conviction as to the competence of the ICC to perform legislative tasks. *Id.* The Court referred to the enormity of the job of prescribing rates for the thousands of roads and products, *id.* at 505, and concluded that, subject to the prohibition of discrimination and of unreasonable rates,

"the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

*Id.* at 493, quoting *ICC v. Baltimore & O. R.R.*, 43 F. 37, 50-51 (1890). See also *Cincinnati, N.O. & Tex. Pac. Ry. v. ICC*, 162 U.S. 184 (1896) (denying grant of rate-making power).

railroads wished to be exempted from the long and short haul provision.<sup>29</sup> In the *Intermountain Rate Cases*<sup>30</sup> seventeen carriers applied for exemptions covering most of the United States, alleging competition by water carriers and Canadian railroads as circumstances justifying exceptional treatment. The ICC denied in large part the application, allowing percentage variations in rates for travel from some zones to others. The Court denied that any legislative power had improperly been delegated to or exercised by the ICC. Its authority to grant an exemption was made "to depend upon the facts established and the judgment of the body in the exercise of a sound legal discretion."<sup>31</sup> That discretion was sufficiently restrained by the standards laid down in sections two and three of the act, forbidding undue preferences and discrimination.<sup>32</sup>

Despite the language of "determining facts," or "filling in interstices," or "acting under standards," however, the standards under which the regulatory commissions acted were vague, and their powers were far greater than what earlier had been granted. It is unlikely that the Minnesota Railroad and Warehouse Commission was much enlightened by the statutory command that rates be "reasonable and equal," or that exemption from the long and short haul provision was a more certain affair because the ICC was charged with stamping out undue preferences and discrimination.<sup>33</sup> Moreover, the far-reaching influence of the railroad com-

---

The same year the Maximum Rate Case was decided, the Court made another significant incursion on the ICC's power. In *ICC v. Alabama Midland Ry.*, 168 U.S. 144 (1897), the Commission was shorn of its power to determine exceptions to § 4 of the Act, providing that railroads should not charge more for a short than for a long haul "under substantially similar circumstances and conditions." Act of 4 Feb. 1887, ch. 104, § 4, 24 Stat. 380. The Court declared that railroads need not apply to the ICC for exemption, since no violation would exist even in the absence of permission, if circumstances were not substantially similar. Justice Harlan, dissenting, stated that the ICC had "been shorn, by judicial interpretation, of authority to do anything of an effective character." 168 U.S. at 176.

<sup>29</sup>Act of June 18, 1910, ch. 309, 36 Stat. 539, 547. The change was effected by deleting the phrase "substantially similar circumstances and conditions," the determination of which *ICC v. Alabama Midland Ry.*, 168 U.S. 144 (1897), held could be made by carriers without prior ICC approval. See note 28 *supra*.

<sup>30</sup>234 U.S. 476 (1914).

<sup>31</sup>*Id.* at 485-86.

<sup>32</sup>*Id.* at 487-88. See also *St. Louis & Iron Mtn. & S. Ry. v. Taylor*, 210 U.S. 281 (1908) (rejecting, on the authority of the *Intermountain Rate Cases*, the argument that the ICC was improperly delegated power to determine the height of draw bars).

A similar position was taken by the Supreme Court in other areas of economic regulation. For example, the Tea Inspection Act of 2 March 1897, ch. 358, 29 Stat. 604, 605, provided that a board should give uniform standards of "purity, quality, and fitness for consumption" of imported teas. The Court rejected a challenge to the delegation of such power, holding that "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute." *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904). In *Union Bridge Co. v. United States*, 204 U.S. 364 (1907), the Court sustained the Secretary of War's power to order changes in the structure of a bridge which he determined to be an "unreasonable obstruction to free navigation." *River and Harbor Act of 3 March 1899*, ch. 425, 30 Stat. 1121, 1153. Congress might, it held, properly delegate the power "to determine some fact or state of things upon which the enforcement of its enactment depends." 204 U.S. at 387.

<sup>33</sup>But see T. LOWI, *THE END OF LIBERALISM* 131 (1969), arguing that by comparison with later grants of power to federal regulatory commissions, the language of the Interstate Commerce Act was at least "freighted with meaning."

missions, over both individual fortunes and community progress, multiplied by the same factor the significance of agency decision-making.<sup>34</sup>

To some extent, the courts' application of outmoded justifications to the new regulatory agencies may simply reflect judicial awareness of the need for regulation which traditional democratic institutions like the legislatures could not provide.<sup>35</sup> One finds repeated references to the need for a body, unlike the legislature, which would be continually in session to cope with the unpredictable circumstances which might necessitate a rate change.<sup>36</sup> To set rates for the great number of routes would also require an expenditure of time which even a legislature constantly in session could put to more profitable use.<sup>37</sup> But a thoroughgoing belief in the division of powers among the holy trinity of nineteenth century institutions could have overcome greater difficulties than these. If acceptable regulation could only be secured by the legislative process of committee consideration, hearings, debate, partisan criticism and public voting, then the legislature might have been expanded to a size adequate to deal with the problems facing it. If the exercise of the franchise over legislative decision-makers were really a safeguard against arbitrary action, it would have been possible to arrange for the popular election of commissioners.

It would be anachronistic, moreover, to impute to the judiciary of the progressive era acceptance of several justifications later advanced for the delegation of power to regulatory agencies. Nobody then voiced the rationale subsequently developed by interest-group liberalism: that agency decision-making was acceptable because it was scrutinized and influenced by those most closely concerned.<sup>38</sup> Although the turn of the century witnessed the birth of politically important unions and professional organizations, their influence was only beginning to be felt, even at the polls.<sup>39</sup> Nor did the courts think that the expertise of regulatory agencies qualified them to act in areas where the legislature was not competent. While Wilson suggested that notion as early as 1887,<sup>40</sup> it was not ac-

<sup>34</sup>Gabriel Kolko has persuasively argued that there was little serious objection made by railroads to the powers delegated to and exercised by the ICC. G. KOLKO, *RAILROADS AND REGULATION: 1877-1916* (1965). There was, however, a public sector affected in great measure, and perhaps adversely, by the same measures in which carriers acquiesced.

<sup>35</sup>See L. FREIDMAN, *A HISTORY OF AMERICAN LAW* 385-86 (1973). It is suggested that the question of an improper delegation of power to the state railroad commissions has never been seriously posed. CUSHMAN, *supra* note 1, at 31.

<sup>36</sup>See, e.g., *Chicago & N.W. Ry. v. Dey*, 35 F. 866, 875 (C.C.S.D. Iowa 1888); *Chicago, Burlington & Quincy R.R. v. Jones*, 149 Ill. 361, 37 N.E. 247, 251 (1894).

<sup>37</sup>See, e.g., *Tilley v. Savannah, Fla. & W. R.R.*, 5 F. 641, 656-57 (C.C.S.D. Ga. 1881); *McWhorter v. Pensacola & Atl. R.R.*, 24 Fla. 417, 472-74, 5 S. 129, 136-37 (1888).

<sup>38</sup>See, for example, the argument advanced by the government in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). For a more recent and complete statement of this same thesis, see Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973). See also the criticism offered in T. LOWI, *THE END OF LIBERALISM* 144-56 (1969).

<sup>39</sup>R. WIEBE, *THE SEARCH FOR ORDER* 129 (1967).

<sup>40</sup>Wilson, *The Study of Administration*, 56 POL. SCI. Q. 481 (1941), reprinted from POL. SCI. Q. 197 (1887).



cepted by the courts, nor did it flourish in academic circles, until much later.<sup>41</sup>

JUDICIAL PROTECTION OF INDIVIDUAL FREEDOM AGAINST  
ADMINISTRATIVE AND LEGISLATIVE ACTION

The failure of the judiciary at the turn of the century to react skeptically to the vastly expanded scope of delegation cannot be attributed to simple unawareness of the political reality. The preceding section argued that a genuine commitment to preserve the integrity of the legislative process would have led the courts to seek alternatives to the spread of regulatory agencies. It also suggested that judicial acquiescence cannot be explained by attributing to the courts a belief in agency expertise or in the tenets of interest-group liberalism. A more convincing explanation for the little heed paid to the delegation issue is that by and large the judiciary, was determined to protect a certain cluster of individual rights, saw little choice between legislature and agency, and sought to accomplish its objective by other means. Acting from such motives, the Court would have been disingenuous, if not simply irrational, in complaining that an agency was given powers, the proper and beneficial exercise of which could only be properly and beneficially exercised by the legislature.

If Blackstone had thought that "the public good is in nothing more essentially interested, than in the protection of every individual's his private rights,"<sup>42</sup> the United States Supreme Court's position even as late as 1923 was scarcely distinguishable:

To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.<sup>43</sup>

The protection of the individual envisioned by the Court consisted in securing to him a maximum of freedom to act with regard to his property and his contractual relations.<sup>44</sup> Freedom of action in those respects demanded defense against two constraining forces. On the one hand, it could be enjoyed only if governmental interference were confined to a minimum. Thus the Income Tax Act of 1894,<sup>45</sup> which would have levied

---

<sup>41</sup>For a mature statement of this position, see J. LANDIS, *THE ADMINISTRATIVE PROCESS* 23-28, 96-98, 141-49 (1938). A good example of reliance on this notion by the Supreme Court can be seen in *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). There the Court enunciated the "end result" rule: "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach the result may contain infirmities is not then important." *Id.* at 602.

<sup>42</sup>1 W. BLACKSTONE, *COMMENTARIES*, 139 (1807).

<sup>43</sup>*Adkins v. Children's Hospital*, 261 U.S. 525, 561 (1923). Cf. *G. KOLKO, RAILROADS AND REGULATIONS: 1877-1916*, at 81 (1965); Pound, *Justice According to Law*, 41 COLUM. L. REV. 1, 18-20 (1914).

<sup>44</sup>R. WIEBE, *THE SEARCH FOR ORDER* 81-82, 92-93 (1967).

<sup>45</sup>Act of 27 Aug. 1894, ch. 349, 28 Stat. 509.

upon profits from real estate and personalty, was invalidated as an "assault on capital."<sup>46</sup> The right to income, subject in the case of railroad and public utility rates to legislative and administrative interference, was shielded by the due process clause.<sup>47</sup> Freedom of contract took on a new constitutional dimension as maximum hour and minimum wage legislation also fell before the due process clause.<sup>48</sup> And the "rule of reason" by which the *Standard Oil* case construed the Sherman Act made clear that combinations were not to be condemned for their size alone, as long as they did not unduly restrain commerce, and were arrived at by "normal methods of industrial development."<sup>49</sup> "[T]he freedom of the individual right to contract, when not unduly or improperly exercised," the Court postulated, "was the most efficient means for the prevention of monopoly . . ."<sup>50</sup>

It should not be supposed, however, that the Court was only interested in the protection of big business. For the individual's property and contractual rights also demanded protection against constraint by private concentrations of power and wealth, or at least against those not arrived at by skill, foresight, and industry. In dissolving the Northern Securities Company, for example, the Court specified that "liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce."<sup>51</sup>

The effort made by the Supreme Court during the progressive era to preserve this individual freedom of action took several related forms in the area of administrative law. Those forms, though, had their cognates in the Court's treatment of strictly legislative action. The striking similarity in attitude toward action by regulatory agency and legislature suggests a conviction that both posed the same threat to individual liberty. It follows that control of administrative action was to be sought, not by remanding non-delegable powers to the legislature, but by interposing the judicial shield between individual and agency.

### *The Doctrine of Non-Finality*

Most notable among the judicial efforts to secure individual freedom of action was the argument that administrative fact-finding and decision-

<sup>46</sup>*Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 607 (opinion of Field, J.), *aff'd on rehearing*, 158 U.S. 601 (1895). Any such tax, the Court held, was "direct" within the meaning of Article I, § 9, and had to be apportioned among the states in order to prevent harsh treatment of the smaller states at the whim of the majority. If not, the boundary between nation and states would disappear, "and with it one of the bulwarks of private rights and private property." 157 U.S. at 583.

<sup>47</sup>*See, e.g., Smyth v. Ames*, 169 U.S. 466 (1898).

<sup>48</sup>*See, e.g., Lochner v. New York*, 198 U.S. 45 (1905) (maximum hours for bakers); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (minimum wage for women).

<sup>49</sup>*Standard Oil Co. v. United States*, 221 U.S. 1, 75 (1911).

<sup>50</sup>*Id.* at 62.

<sup>51</sup>*Northern Securities Co. v. United States*, 193 U.S. 197, 351 (1904) (opinion of Harlan, J.). *Cf. Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) (declaring illegal the division of markets and price fixing); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (holding unlawful under § 1 of the Sherman Act restraints of trade permitted at common law).

making could not be final, that interpretation of the constitution and of statutes was ultimately the proper task of the judicial branch of government. The problem was presented most sharply by statutes providing that an agency determination that conduct fell within a prescribed standard should be conclusive and, consequently, that the sole remaining function for the courts was enforcement *simpliciter*. However, legislative action could and did make similarly unsuccessful claims to finality. A law prescribing uniform and fixed rates for carriers of specified commodities<sup>52</sup> differed in no important respect from a determination by commission that a rate of X dollars per mile was a maximum reasonable fare for railroad Y carrying product Z. The judicial response to both situations was a rigid categorization of governmental action as either "legislative" or "judicial." Action of the former sort, rules to which private action had to conform, laid down in advance by either legislature or agency, was always subject to judicial scrutiny before it could be finally effective.<sup>53</sup>

In *Chicago, Milwaukee & St. Paul Railway v. Minnesota*,<sup>54</sup> the Court reviewed a Minnesota statute making conclusive the determination of the state Railroad & Warehouse Commission that a published rate was not "reasonable and equal," and the setting by the commission of a reasonable rate. The commission had fixed a charge for the transportation of milk by the Chicago, Milwaukee & St. Paul which the railroad refused to acknowledge, and had applied for mandamus to enforce its order. The Court quashed the issuance of mandamus, holding that due process and equal protection required a judicial investigation of the reasonableness of rates set by the commission.

The Court's due process argument had a peculiarly modern ring. It pointed out that the commission had none of the "machinery of a court of justice."<sup>55</sup> It needed only to "find" a published rate unreasonable, and was required to provide no hearing, notice, or opportunity to introduce witnesses.<sup>56</sup> That the insufficiency of the required procedure was not the

<sup>52</sup>Act of 12 April 1893, ch. 24, 1893 Neb. Laws (held unconstitutional in *Smyth v. Ames*, 169 U.S. 466 (1898)).

<sup>53</sup>The discussion which follows considers only those administrative actions which determined future conduct, and which the courts considered to be "legislative" in character. *Prentiss v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908) (rate-making a legislative action). It thus excludes from discussion administrative action in cases like reparation suits, *see, e.g.*, *ICC v. Cincinnati, N.O. & Tex. Pac. Ry.*, 167 U.S. 479, 499 (the Maximum Rate Case) (1897) (reparation suit judicial in character), and workmen's compensation, *see, e.g.*, *Crowell v. Benson*, 285 U.S. 22 (1932). It should be noted, however, that the doctrine of non-finality of administrative action was applied by the courts with equal vigor to agency determinations of the latter sort. *See Crowell v. Benson*, 285 U.S. 22 (1932) (trial de novo of administrative award of workmen's compensation). In general it may be said that the right to judicial review was asserted whenever action was taken directly and conclusively affecting individual rights by the application of a standard to a specific case. *Cf. Curtis, Judicial Review of Commission Rate Regulation—The Ohio Valley Case*, 34 HARV. L. REV. 862, 877-78 (1921). Nevertheless, it was felt that there were special reasons requiring such review in the case of administrative orders determinative of future conduct. *See infra*, p. 17.

<sup>54</sup>134 U.S. 418 (1890), *rev g* 38 Minn. 281, 37 N.W. 782 (1888).

<sup>55</sup>134 U.S. at 457.

<sup>56</sup>*Id.*

only fatal infirmity of the statute was, however, clear. For the Court also declared that the railroad was deprived of equal protection insofar as it was denied the opportunity to make a reasonable profit, while other carriers were not so treated.<sup>57</sup>

It soon became evident that the due process clause, apparently restricted by the *Chicago, Milwaukee & St. Paul* case to matters purely procedural, offered business corporations the same substantive safeguard as did equal protection. In *Smyth v. Ames*<sup>58</sup> the Court invalidated a Nebraska act fixing a schedule of maximum freight rates, and giving the state board of transportation the power to amend the rate for any commodity on two weeks' notice. The Court found that state action which set rates unreasonably low contravened the due process clause of the fourteenth amendment.<sup>59</sup> In defining the factors which made for reasonable compensation, the *Smyth* Court stated that "[u]ndoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them . . . But . . . the court cannot shrink from the duty to determine whether . . . the Nebraska statute invades or destroys rights secured by the supreme law of the land."<sup>60</sup> To allow the statutory schedule to preclude the courts would make the legislature, and not the courts, the final judge of constitutionality.<sup>61</sup>

It is difficult to imagine that if, as the Court admits, the commission could better judge the reasonableness of a rate, it could not also better measure the same rate against a constitutional standard of confiscation, however defined.<sup>62</sup> The Court's overturning of rates set by an admittedly

---

<sup>57</sup>*Id.* at 458.

<sup>58</sup>169 U.S. 466 (1898).

<sup>59</sup>*Id.* at 526, 546-47. The Court also found that such state action ran afoul of the equal protection clause of the fourteenth amendment. *Id.* at 526.

<sup>60</sup>*Id.* at 527.

<sup>61</sup>*Id.* at 527-28. Because of the provision of the Interstate Commerce Act, as originally enacted, that the Commission's report was only to be "prima facie evidence of the matters therein stated," Act of 4 Feb. 1887, ch. 104, § 16, 24 Stat. 385, the courts during the first two decades of the Commission's existence refused to grant any sort of finality to Commission orders. 2 I.L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 385-87 (1931). This refusal resulted in the frequent grant of a de novo hearing. See, e.g. *Texas & Pac. Ry. v. ICC*, 162 U.S. 197, 239 (1896); *ICC v. Alabama Midland Ry.*, 168 U.S. 144, 174-75 (1897).

<sup>62</sup>Justice Harlan's statement that the finality of legislative or of agency action "is in opposition to the theory of our institutions," 169 U.S. at 527, suggests that the assertion of judicial finality may have rested simply on the notion of judicial supremacy sometimes read into *Marbury v. Madison*: that the courts should be the final arbiters of constitutional questions. 5 U.S. (1 Cranch) 137 (1803). For a recent example of that expansive reading of *Marbury*, see *United States v. Nixon*, 418 U.S. 683, 703 (1974). See generally G. GUNTHER, CONSTITUTIONAL LAW 25-36 (9th ed. 1975).

Such a suggestion passes over a number of unsettled questions. In the first place it was by no means clear, at least in 1898, that the due process and equal protection clauses of the fourteenth amendment were intended to protect corporations, and not simply individuals, against state action. See 2 C. & M. BEARD, RISE OF AMERICAN CIVILIZATION 111-14 (1927); FREUND, ON UNDERSTANDING THE SUPREME COURT 30-34 (1949); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371-75 (1938); Mendelson, *Mr. Justice Black and the Rule of Law*, 4 MIDWEST J. POL. SCI. 250, 251 (1960); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576 (1949) (Black & Douglas, JJ., dissenting); *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting). It was not

competent legislature and agency reveals an attitude significant in its bearing on the doctrine of the non-finality of agency action: the conviction of an essential difference between legislative and judicial action. In *Prentiss v. Atlantic Coast Line Co.*<sup>63</sup> the Court found that it might properly enjoin the Virginia Corporation Commission from attempting to enforce an order fixing railroad passenger rates, despite a statute forbidding United States courts to intervene in proceedings in "any court of a state."<sup>64</sup> The application of the statute, it declared, was confined to bodies whose actions were judicial in nature, that is, which were concerned with declaring and enforcing liabilities arising from present or past facts and existing laws. The setting of rates, however, because it was concerned with making rules for the future, was legislative in nature.<sup>65</sup>

A similar recognition attended and strongly influenced the grant of powers to the Interstate Commerce Commission. In *ICC v. Cincinnati, New Orleans & Texas Pacific Railway*,<sup>66</sup> the Court invalidated the Commission's action in setting maximum rates for several carriers between Cincinnati, Chicago, and a number of other cities. The Court began by stating, "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."<sup>67</sup> It then read the Interstate Commerce Act's command that the Commission should "execute and enforce the provisions of this act"<sup>68</sup> as granting much tamer powers, "partly judicial, partly executive and administrative, but not legislative."<sup>69</sup> The Act was soon thereafter amended explicitly to grant the ICC ratemaking powers.<sup>70</sup> But

---

until 1886 that the Court first applied the equal protection clause to corporations, *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886), thus extending its reach beyond racial discrimination, to which it had been limited by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). And it was not until three years thereafter that the due process clause was similarly expanded. *Minneapolis & St. L. Ry. v. Beckwith*, 129 U.S. 26 (1889). Moreover, even if the due process clause were to cover corporations, it was not certain at the time *Smyth* was decided that it was meant to apply to more than procedure. R. WIEBE, *THE SEARCH FOR ORDER* 82 (1967). Furthermore, there was no indication that what it commanded must be judicial procedure. See *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418, 463-64 (1890) (Bradley, J., dissenting) (arguing that legislative process is due process). Finally, to claim baldly as did the Court in both *Smyth v. Ames*, 169 U.S. at 526, and *Chicago, M. & St. P.*, 134 U.S. at 458, that there was a violation of equal protection in denying a judicially determined reasonable return to one carrier while allowing it to others is to raise to constitutional status every allegation of uneven-handed governmental treatment.

<sup>63</sup>211 U.S. 210 (1908).

<sup>64</sup>Act of 2 Mar. 1793, ch. 22, § 5, 1 Stat. 334 (codified in U.S. Rev. Stat. § 720 (1873-74)). The Court assumed that the commission was a court within the meaning of the statute. 211 U.S. at 224.

<sup>65</sup>211 U.S. at 226. See also *Keller v. Potomac Electric Co.*, 261 U.S. 428, 440 (1923); *Louisville & N.R.R. v. Garrett*, 231 U.S. 298, 305-07 (1913); *ICC v. Cincinnati, N.O. & Tex. Pac. Ry.*, (the Maximum Rate Case) 167 U.S. 479, 499 (1897).

<sup>66</sup>167 U.S. 479 (1897). Cf. *Cincinnati, N.O. & Tex. Pac. Ry. v. ICC*, 162 U.S. 184 (1896).

<sup>67</sup>167 U.S. at 499.

<sup>68</sup>Act of 4 Feb. 1887, ch. 104, § 12, 24 Stat. 383, as amended by Act of 2 March 1889, ch. 382, § 4, 25 Stat. 858.

<sup>69</sup>167 U.S. at 500-01.

<sup>70</sup>Act of 29 June 1906, ch. 3591, 34 Stat. 584.

recognizing the Court's obvious hostility toward any assertion of the finality of "legislative" action, and fearing that the amendment would otherwise be found unconstitutional, the Hepburn Act explicitly provided that any rates set by the Commission would only be *prima facie* reasonable, and not conclusive upon the courts.<sup>71</sup>

The use of the term "legislative" to describe agency ratemaking evinces an awareness on the part of the Court of the essential similarity of the action of ratemaking whether exercised by an agency, as in *Chicago, Milwaukee & St. Paul*, or by the legislature, as in *Smyth v. Ames*. There is no pretense of calling such action administrative, for the power and the discretion involved are evidently the sort which formerly had been lodged solely in legislatures. Indeed, it was pointed out at the time that the Court's recognition of this similarity rendered incomprehensible the assertion that legislative power had been delegated properly to a regulatory agency.<sup>72</sup>

The argument that legislative action could not be final because it laid down rules in advance of action is quite different from the interpretation sometimes given *Marbury v. Madison*: that the courts should be the ultimate expositors of the constitution. The latter rests, at least with regard to the federal courts, on the constitutional commands that "(t)he judicial power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties," and that the Constitution and laws "made in pursuance thereof" shall be the supreme law of the land,<sup>73</sup> and on the consequent demand that consistency makes on the courts to measure laws against the constitution.<sup>74</sup> The distinction between legislative and judicial action, on the other hand, arose from the puritan view, still strongly persisting, of man as a free moral agent, with a power to choose what to do, and a responsibility coincident with that power. Law, while it was desirable, indeed necessary, as a guide to individual action, was not to be a coercive authority. Civil consequences, like supernatural ones, should follow upon action, not determine it in advance.<sup>75</sup>

#### *Definition of the Constitutional Limits of Administrative and Legislative Action*

That administrative action was coercive in advance of individual action was not, however, the Court's sole objection to the regulatory agency. In

<sup>71</sup>Act of 29 June 1906, ch. 3591, § 5, 34 Stat. 590. See J. BLUM, *THE REPUBLICAN ROOSEVELT* 96-97 (1962).

<sup>72</sup>Harriman, *Administrative Control of Corporations*, 6 PROC. AMER. POL. SCI. ASS'N 33, 39 (1909).

<sup>73</sup>U.S. CONST. art. III, § 2; art. VI, cl. 2.

<sup>74</sup>5 U.S. (1 Cranch) 137, 177-79 (1803).

<sup>75</sup>Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 23 (1914); See Pound, *Puritanism and the Common Law*, 45 AMER. L. REV. 811 (1911).

The judicial doctrine of non-finality was not without its effect in the political arena. It evoked at least two responses worthy of note. The first was proposals for the popular review of judicial decisions, by methods other than constitutional amendment. See, e.g., W. RANSOM, *MAJORITY RULE AND THE JUDICIARY* (1912). The second was the recall of judges. See, e.g., C. MCCARTHY, *THE WISCONSIN IDEA*, 268-69 (1912).

addition to the doctrine of non-finality, the Court's effort to preserve individual freedom of action took form in the notion that regulatory action should be confined within narrow and well-defined bounds. Judicial oversight was necessary to constrain agency action, not only because the latter might chill in advance the exercise of individual rights, but also because, being rule of government and not of law, it might be both overzealous and arbitrary. That this judicial oversight is as evident in the Court's response to legislative action strictly defined as it is in the constraints imposed on regulatory agencies demonstrates again the reason why the Court of the progressive era was unconcerned with the significant legislative powers then and shortly thereafter delegated to such agencies as the ICC, and FTC, and the Federal Reserve Board. For the majoritarian excesses which the Court was concerned to control were as apparent in legislative action properly so-called as they were in administrative action. And a remand of power to such a legislature would have done little to curb a danger the Court saw posed from both quarters alike.

The attempt to restrict regulation in the administrative arena took shape in the notion of the rule of law; with respect to legislative action it took the form of substantive due process. Both proceeded under the due process clauses of the fifth and fourteenth amendments, the former to safeguard private property dedicated to the public use by railroads and public utilities, the latter primarily to preserve against legislative interference the contractual relations between private citizens. The social darwinism evident in these protective judicial efforts found its theoretical justification in a notion that resolution of constitutional questions was a task for which judges were peculiarly capable.

#### Administrative Action--The Rule of Law

The right of the states to limit the return a railroad might get for its service was recognized in 1877<sup>76</sup> as the natural concomitant of a monopoly position achieved in large measure through state assistance.<sup>77</sup> That rates could not be fixed too low was, however, quickly asserted. In *Reagan v. Farmers Loan & Trust Co.*,<sup>78</sup> while sustaining rates set by a state railroad commission, the Court noted:

This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of unnecessary and uncompensated

---

<sup>76</sup>*Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1877).

<sup>77</sup>*Id.* at 126-33. See C. GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890*, at 268-71 (1960).

<sup>78</sup>154 U.S. 362 (1894).

taking or destruction of any private property, legally acquired and legally held.<sup>79</sup>

In *Smyth v. Ames* stockholders of the Union Pacific Railroad sued to enjoin the railroad from reducing its charges under a Nebraska statute setting maximum freight rates.<sup>80</sup> They also sought to restrain the state board of transportation from exercising its power to lower the rate on any commodity. The Supreme Court upheld a Circuit Court injunction, finding in the fourteenth amendment's due process clause a prohibition against state action fixing rates so low as to take private property without reasonable compensation.<sup>81</sup>

Although the due process clause gave little guidance,<sup>82</sup> the Court tried to specify the elements to be considered in the ascertainment of a confiscatory rate. A railroad, it declared, was entitled to a fair return on the fair value of the property and services it committed to public use. The determination of fair value required a consideration of original cost, improvements, the value of the road's stock, reproduction cost, operating expenses, and other factors.<sup>83</sup> What weight was to be given to any of these elements was not made clear. Subsequent cases involving state public utility commissions attempted, with conflicting results, to specify the relation among the elements which were to be considered in making up the rate base.<sup>84</sup>

The doctrine that the rate-making orders of the ICC had to be supported by substantial evidence, coupled with the Act's provision that such orders would only be prima facie reasonable, rendered unnecessary in most cases the resort to constitutional grounds for invalidation of ICC orders.<sup>85</sup> For example, in *Florida East Coast Line v. United States*,<sup>86</sup> the Commission order establishing rates on vegetables and citrus fruits shipped from Florida to consumption points outside the state was struck down. "[W]here it is contended that an order whose enforcement is

---

<sup>79</sup>*Id.* at 399.

<sup>80</sup>169 U.S. 466, 470 (1898). Similar suits by other carriers were joined.

<sup>81</sup>*Id.* at 526. The Court also found a violation of equal protection in the denial of a fair return to the carriers while other carriers were permitted to earn such a return. *Id.* According to the Court's computation, several of the roads actually lost money on local business. *Id.* at 547.

<sup>82</sup>Inclusion of a just compensation clause in the fourteenth amendment was considered and rejected at the time of its enactment. THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 85 (Kendrick ed. 1914).

<sup>83</sup>169 U.S. at 546-47. Use of a measure like fair return on capital would have been impracticable at the time, since the frequency with which stock was watered would have produced greatly inflated returns. *See id.* at 544-45; G. KOLKO, RAILROADS AND REGULATION: 1877-1916, at 65-66 (1965).

<sup>84</sup>*See, e.g.,* Minnesota Rate Cases, 230 U.S. 352, 450, 472, (1913) (rejecting original cost and reproduction cost); Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922) (approving historical cost); S.W. Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276 (1923) (approving reproduction cost); Bluefield Water Works v. Pub. Serv. Comm'n, 262 U.S. 679 (1923) (approving reproduction cost); Georgia Ry. & Power Co. v. Railroad Comm'n 262 U.S. 625 (1923) (rejecting reproduction cost); United Fuel Gas Co. v. Railroad Comm'n, 278 U.S. 300 (1929) (use of original cost and book value); United Fuel Gas Co. v. Pub. Serv. Comm'n, 278 U.S. 322 (1929) (use of original cost and book value).

<sup>85</sup>2 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 431-39 (1931).

<sup>86</sup>234 U.S. 167 (1914).



resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide."<sup>87</sup>

Nevertheless the Court's perception of its constitutional position vis a vis the ICC was ultimately identical with that which it asserted in cases involving state utility commissions. In *St. Louis & O'Fallon Railway v. United States*<sup>88</sup> there was overturned a Commission order regarding valuation of carrier property for purposes of recapture of excess earnings. By statute the ICC was required to "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes."<sup>89</sup> What was purportedly a question of statutory interpretation thus became a constitutional question, to which the Court addressed itself as it so often had done under the due process clause in the state commission cases. In light of its holdings in those cases, the Court invalidated the Commission's determination for failing to give weight to current reproduction costs, regardless of the probative value of the evidence adduced to support the estimates of such costs. It was clear that "[t]he annulment of [the] order though nominally ascribed to a 'mistake of law,' was in effect a substitution of the judgment of the Court for that of the Commission."<sup>90</sup>

The Court's attempt, in the cases following *Smyth v. Ames*, to define a constitutionally required minimum return under the idea of a fair return on fair value, concealed profound difficulties. In the first place, the fixing of the rate base and the return were, at bottom, matters of opinion, and an estimate of the fairness of the rate required as well a prediction as to earnings under it, and as to the operating expenses which would be incurred during the period for which it would be in effect.<sup>91</sup> More important, the Court's attempted definition of fair value ignored the fact that the value of the assets was ultimately a function of capitalized earnings, which themselves depended on the rate which was to be set.<sup>92</sup>

The impulse behind the interposition of the due process clause between public utility and rate-making agency was the desire to set a constitutional limit to the control over the utility which could be exercised in the public interest. By rephrasing the question of the minimum allowable return as a question of just compensation,<sup>93</sup> the Court denied to regulatory agencies the freedom to act within a grey area of reasonableness where the needs of the citizens at large could affect the

---

<sup>87</sup>*Id.* at 185. See also *Philadelphia & Reading Ry. v. United States*, 240 U.S. 334 (1916).

<sup>88</sup>279 U.S. 461 (1929).

<sup>89</sup>Transportation Act of 1920, Pub. L. No. 66-152, § 422, 41 Stat. 456 (1920).

<sup>90</sup>2 I. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 447 (1931).

<sup>91</sup>*Southwestern Tel. Co. v. Public Serv. Comm'n of Mo.*, 262 U.S. 276, 291 (Brandeis, J., concurring).

<sup>92</sup>V. BRUDNEY & M. CHIRELSTEIN, *CORPORATE FINANCE* 378 n.x (1972); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944).

<sup>93</sup>See *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418, 465 (1890) (Bradley, dissenting); *Cf. Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 227, 241-247 (1897) (fourteenth amendment due process requires just compensation).

earnings allowed to a utility. That the delegation of such a power to a body which had none of the institutional trappings of the legislature was not the feature which the Court found objectionable finds some support in the fact that the doctrine of fair return on fair value was first set forth against legislative action in *Smyth v. Ames*.

### Legislation Action--Substantive Due Process

More convincing proof that the fundamental judicial complaint against the exercise of legislative powers by regulatory agencies was born of a desire to shield individual freedom of action against majoritarian excesses is provided by the simultaneous development of the doctrine of substantive due process. While the myriad routes and products shipped by the railroads made rate-making a function suitable to be delegated to an agency, the state legislatures and Congress retained and exercised, in the form of wage and hour legislation, their traditional power over relations between private parties. To the effort to shift the burdens of some private citizens to others the Court responded by trying to define, under the liberty and property protected by the due process clause, the essence of freedom of contract. And as was the case with the notion of the rule of law, the doctrine of substantive due process attempted to control the effect which considerations of the public welfare had on the decision-making process of, in this case, the legislature.

*Lochner v. New York*,<sup>94</sup> for example, concluded that "[s]tatutes limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual. . . ."<sup>95</sup> Other cases attempted to pick out points defining the line of permissible interference with the freedom of contract.<sup>96</sup>

### The Role of the Judiciary

While these judicial efforts at containment of what were seen as legislative excesses were clearly reacting to changed economic conditions, they were underpinned by assumptions about what was the proper judicial mode of thought, assumptions which supported, if they did not entail, the social darwinism of the courts. Axiomatic, of course, was the proposition that the Constitution set out in all necessary detail the limits

---

<sup>94</sup>198 U.S. 45 (1905).

<sup>95</sup>*Id.* at 61.

<sup>96</sup>*See, Adkins v. Children's Hospital*, 261 U.S. 525, 545-552, 554 (1923) (minimum wage for women against due process); *Coppage v. Kansas*, 236 U.S. 1, 11 (1915) (a state statute making it a misdemeanor for employer to require employee to execute yellow dog contracts violated the fourteenth amendment's due process clause; *Muller v. Oregon*, 208 U.S. 412, 421-422 (1908) (approving ten hour industry day); *Adair v. United States*, 208 U.S. 61, 172 (1908) (striking down under the fifth amendment, a federal statute making it a criminal offense for an employer to discharge employee solely because of union membership); *Holden v. Hardy*, 169 U.S. 366, 370 (1898) (approving eight hour day for miners); *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897) (condemning restrictions in right to contract out of state for insurance).

within which the American people for whom it was drafted wished to have their government act. Nor, the theory proceeded, was the meaning of the document as enacted to be changed other than by the procedures therein set forth. For, in the words of Justice Story, to which still held the judicial supremacists of the end of the century

The only sound principle is to declare, *ita lex scripta est*, to follow, and to obey Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice, than mere policy and convenience

The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be the same yesterday, to-day, and for ever.<sup>97</sup>

Upon this Constitution the judiciary was to act in two ways. It had first of all the job of defining the terms in which were phrased the bounds of sovereign power and the rights preserved to the people. With well-defined terms, the law to be applied in any case would then be the result of rigid deduction according to well-established principles. "In this development, the rules of construction are plain and easy of application. It is the function of the courts to determine by logical processes the decisions predetermined by the law-giver."<sup>98</sup> In this logical system, "the personality of the judge disappears in the mechanical process of deduction involved and there results the phenomenon of a 'government of laws and not of man.'"<sup>99</sup>

It would be difficult to underestimate the powerful claim to legitimacy which such an assertion of rationality made. Nevertheless, the pretense of logic and internal consistency coexisted with an admission that the external element of social policy might have some effect on the judicial decision-making process. And this latter admission proved to be the wedge which was ultimately to open up the formal and self-contained system of judicial thought which sheltered social darwinism in the courts.

The decision in *Smyth v. Ames* followed only 21 years upon *Munn v. Illinois*,<sup>100</sup> which declared that a public utility's freedom to make any return it wished was subject to the public interest in the rates, which would be thereby affected. Moreover, while a utility was entitled constitutionally to a reasonable compensation for its services, the Court pointed out that the determination of reasonableness was a task for the legislature, not the courts.<sup>101</sup> Similarly, the effort of the substantive due process cases to define and protect liberty of contract never obscured the admission that liberty of contract might be interfered with by a government employing effective means to accomplish legitimate publicly

<sup>97</sup>1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 426 (1833).

<sup>98</sup>C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 501 (1959).

<sup>99</sup>*Id.* at 502.

<sup>100</sup>94 U.S. 113 (1876).

<sup>101</sup>*Id.* at 133.

necessary ends.<sup>102</sup> The difficulty with the simultaneous assertion of the supremacy of a formal judicial mode of thought, however, was that the effectiveness of a maximum hour law in preserving the health of bakers was a matter for scientific and sociological study, matters which, it was ultimately perceived, the judicial branch of the government was ill-equipped to undertake.

---

<sup>102</sup>This is the standard phrasing of the test for review in the substantive due process cases. *See, e.g.,* *Adkins v. Children's Hospital*, 261 U.S. 525, 546-553 (1923); *Coppage v. Kansas*, 236 U.S. 1, 14 (1915); *Adair v. United States*, 208 U.S. 161, 172 (1908); *Lochner v. New York*, 198 U.S. 45, 53-56 (1905). *See also* the dissent of Chief Justice Hughes in *Coppage v. Kansas*, arguing that reasonable men could differ about the effectiveness of the statute there in question, and that consequently it should be upheld. 236 U.S. at 33-35.

